FILED
DEC 1 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,

vs.

A. T. SCHORB,
Respondent.

No. 632

PETITION FOR WRIT OF CERTIORARI

To the Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

ARNOT L. SHEPPARD,
Attorney for Petitioner.

302 Union Station,
St. Louis, Missouri.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Petition for writ of certiorari	1-8
Statement	1
Opinion of the Court below	2
Jurisdiction of this Court	2
Questions presented	5
Reasons relied upon for the allowance of the writ	5
Prayer	7
Brief in support of petition	9-16
Summary of argument	9
Argument	12

Cases Cited.

Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 283, 73 L. Ed. 957 ..... 11, 15

Brady v. Sou. R. Co., 320 U. S. 476, 88 L. Ed. 239 ..... 11, 12, 16

Cain v. Fort Worth & Denver City R. Co., 75 F. 2d 103, 106 ..... 9, 12

C. M. & St. P. R. Co. v. Lindeman, 143 F. 946, 949 ..... 10, 13

Chesapeake & O. R. Co. v. Mihas, 280 U. S. 102, 106, 74 L. Ed. 207, 211 ..... 9, 11, 14

Connelley v. P. R. Co., 201 F. 54, 56 ..... 9, 12

Frese v. C. B. & Q. R. Co., 263 U. S. 1, 68 L. Ed. 131, 132 ..... 11, 15

In re Bowling Green Milling Co., 132 F. 2d 279 ..... 10, 14

McClellan v. P. R. Co., 62 F. 2d 61, 63 10

Owens v. U. P. R. Co., 319 U. S. 715, 87 L. Ed. 1683 2

Reading Co. v. Haldeman, 20 F. 2d 53, 55 ..... 9, 12

Sickelco v. U. P. R. Co., 111 F. 2d 746.....10, 14
Sumney v. Southern R. Co., 89 F. 2d 437, 439..... 9
Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610..... 2

Statutes Cited.

Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65.. 2
Judicial Code, as amended by Act of Feb. 13, 1925, Chap. 229, 43 Stat. 938, Title 28, U. S. C. A., Sec. 347 2

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Petitioner, vs. A. T. SCHORB, Respondent.	No. .....

PETITION FOR WRIT OF CERTIORARI

To the Circuit Court of Appeals, Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this Honorable Court to grant and issue its writ of certiorari directed to the Circuit Court of Appeals within and for the Eighth Circuit, hereinafter referred to for convenience as the court below, directing it to send to this Court for review its opinion and judgment rendered and entered on October 19, 1945, rehearing in which was denied November 7, 1945, by the court below, in this case lately there pending, styled Terminal Railroad Association of St. Louis, a corporation,

Appellant, v. A. T. Schorb, Appellee, No. 13,081, on the docket of the court below, affirming a judgment of the United States District Court within and for the Eastern Division of the Eastern Judicial District of Missouri, in said cause in favor of respondent and against your petitioner herein.

OPINION OF THE COURT BELOW.

The opinion of the court below in this cause, which is by this petition sought to be reviewed, appears on pages 207 to 216 inclusive, of the printed transcript of the record filed herein. It has not yet been published in the Federal Reporter, or in the advance sheets thereof.

JURISDICTION OF THIS COURT.

The action here sought to be reviewed was brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65). The jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 938, Title 28, U. S. C. A., Sec. 347, providing for review in this Court by certiorari of decisions of the various United States Circuit Courts of Appeals. Authorities sustaining the jurisdiction are Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610, and Owens v. U. P. R. Co., 319 U. S. 715, 87 L. Ed. 1683.

This action is brought by respondent under the Federal Employers' Liability Act (hereinafter called the Act) (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65) to recover damages for personal injuries sustained September 11, 1943 (R. 83).

He had been in petitioner's employ as a switch foreman for fifteen years (R. 84).

He was injured in one of petitioner's switch yards (R. 12) in East St. Louis, Illinois (R. 12), when he stepped on a switch track and was struck (R. 86) when cars were shunted ("kicked") against a standing car on track 18 (R. 99, 100).

Both respondent and his witnesses testified that this switch yard was a dangerous place which necessitated constant vigilance by switchmen to avoid injury (R. 23, 25, 52, 96, 98, 100).

Immediately before his injury respondent had been directed by his superior to go to the shanty and obtain the bills of lading covering a train he was to take out of the yard (R. 85, 86). He started towards the shanty immediately (R. 86), moving in a northeasterly direction (R. 86) towards a Burlington freight car standing on track 18 (R. 86). When respondent reached a point about three feet west and ten feet south of the north end of this Burlington car, he looked towards the south (R. 97) and could see to the point marked "19" on the plat (R. 129). From that point he could see some cars between Cabin One and the B. & O. crossing, but saw no engine (R. 98). He could not tell whether or not the cars were moving (R 98). At that time the switches were not lined for a movement to track 18 (R. 87).

Respondent then turned and walked north alongside the Burlington car for a distance of ten feet to the north end of it, and an additional ten feet or twelve beyond the north end of that car (R. 99). At that point he again looked towards the south, but could not see beyond the Burlington car (R. 99). Consequently, his looking at that time and place was ineffectual (R. 99). He then turned east and started across the track not knowing whether or not cars were being moved over that track (R. 99, 100).

When he reached "about the middle" of the track (R. 100), he heard the yardmaster shout to him, turned, and

the Burlington car "jumped" north (R. 86, 100), struck and injured him; derailed and ran along on the ties for about a hundred feet (R. 59, 73).

The Burlington car had been struck by three cars from the south which had been shunted or kicked against the Burlington car. The intention of the switch foreman in charge of the crew which shunted the cars, was to strike the Burlington car hard enough to roll all four cars far enough north to clear the cross-over between the east-bound yard and the ice house lead (R. 151).

The shunted cars moved at a speed estimated at from three and a half to five miles an hour (R. 142, 154), ten miles an hour (R. 161), twelve to fifteen miles an hour (R. 72).

Respondent's witness Butler (R. 18) and appellant's witness Siebert (R. 142) testified the customary speed of shunted cars was three and a half to five miles an hour. Respondent's witnesses Butler (R. 57), Tunze (R. 61), and Burk (R. 65), and petitioner's witness Jefferson (R. 154), testified there was no usual or customary speed.

The uncontradicted evidence (R. 26, 27, 143, 146, 154) was that the maximum speed of shunted cars is determined solely by the risk of damage to the cars, their contents, the track and roadbed; and not potential injury to switchmen, who are expected to keep out of the way of moving cars (R. 26, 27).

Respondent submitted his case upon "excessive" speed of the shunted cars (R. 183). His injuries were severe; and the verdict was in his favor for $35,000 (R. 199).

QUESTIONS PRESENTED.

I.

May respondent, injured when struck by a moving box car in a switch yard, recover on the ground that the car was struck by other cars shunted or kicked against it at alleged excessive speed when the evidence:

(a) Shows that petitioner owed respondent no duty to shunt the cars at any given speed?

(b) Shows that the alleged usual speed of shunted cars was fixed solely by the danger of damage to other cars, their contents, and the track; and not by any danger to switchmen, who were expected to look out for themselves?

(c) Shows that for shunting cars there was no normal or usual speed fixed by law, rule or a definite, uniform, universal custom?

(d) Shows that respondent stepped on the track without using any care to ascertain whether or not cars were in process of being shunted on that track?

(e) Fails to show that respondent would not have been injured had the cars been shunted at a slower speed?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

Proof of violation of a duty by a defendant is insufficient to show actionable negligence. The proof must go further and show violation of a duty defendant owed to plaintiff. Therefore, before respondent could make a submissible case against petitioner, he was compelled to prove that petitioner owed to him the duty of shunting cars at not more than a given speed. There is a complete absence of proof that petitioner owed to respondent any such duty.

In his attempt to prove negligence, respondent relied solely upon alleged excessiveness of the speed of the shunted cars. "Excessive" speed in this sense means a speed which is more than is legally authorized. There is no contention that the law or any rule of petitioner fixed the authorized speed. Therefore, if there was any authorized speed, it must have been fixed by custom.

In the absence of such a custom as will supersede the ordinarily governing principle of law, no duty rested upon petitioner to shunt cars at any certain rate of speed; but, on the contrary, respondent's duty was to look out for moving cars.

II.

Before a custom will be permitted to supersede the law, it must be proved to have been definite, uniform, and known; and to have been followed under certain, definite and uniform circumstances.

(a) There is no such proof in this record (R. 18, 25, 26, 27, 33, 49, 53, 57, 61, 65, 142, 154). The "usual, customary" speed for shunting or kicking cars was said by two witnesses (R. 18, 142) to be three and a half to five miles an hour. Three witnesses (R. 49, 57, 61, 65, 154) testified there was no usual, customary or proper speed. This evidence was not sufficient to meet the requirements of a binding custom which will supersede the law; but proved no more than a loose, variable practice determined by the caprice of the individual switchman.

III.

Assuming, however, the sufficiency of the evidence to prove a custom, the undisputed evidence by both petitioner's and respondent's witnesses is that the so-called "usual" speed was fixed solely with relation to possible damage to cars, their contents and the tracks; and not

with relation to possible injuries to switchmen, who are expected to protect themselves (R. 26, 27, 143, 146, 154).

Inevitably, therefore, no duty was owed to respondent to limit the speed of shunted cars to the so-called usual or customary speed. Consequently, shunting cars at more than that speed could not have been a breach of any duty petitioner owed to respondent.

IV.

(a) Respondent's own evidence shows conclusively that the sole proximate cause of his injury was his own gross negligence in stepping on the track only ten or twelve feet away from the car (R. 99), at a time when by stepping a few feet towards the west he could have seen the shunted cars moving over the track. He made no effort so to do, but merely looked when and where, because his view was wholly blocked, looking was ineffectual (R. 99), and started across the track, confessedly without ascertaining whether or not cars were moving on that track (R. 99, 100).

(b) There is no evidence that respondent would not have been struck even though the cars had not moved at more than three and a half to five miles an hour.

Therefore, for two reasons respondent has failed to make a case: (1) no negligence of petitioner is shown, and (2) respondent's negligence was solely and proximately causal.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari shall be issued by this Court, addressed to the Circuit Court of Appeals, Eighth Circuit, directing that Court to certify to this Court on a day certain to be named therein, a full and complete transcript of the record of the proceedings in said cause of Terminal Railroad Association of

St. Louis, Appellant, v. A. T. Schorb, Appellee, that Court's number 13,081, to the end that said judgment of said Court may be reviewed by this Court, as provided by law, and that upon such review the judgment of said Circuit Court of Appeals, dated October 19, 1945 (petition for rehearing denied November 7, 1945), shall be reversed, and that petitioner shall have such relief as to this Court shall seem appropriate.

Respectfully submitted,

ARNOT L. SHEPPARD,
Attorney for Petitioner.

BRIEF

In Support of Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT.

I.

The opinion of the court below is directly in conflict with this Court's opinion in Chesapeake & O. R. Co. v. Mihas, 280 U. S. 102, 106, 74 L. Ed. 207, 211, which holds that a plaintiff may not recover damages under the Federal Employers' Liability Act, unless he proves that the defendant breached a duty he owed to plaintiff; that although the violation of a duty may be negligence, it is not actionable unless the duty was owed to plaintiff.

Respondent grounds his case upon petitioner's alleged breach of a lawful duty in shunting the cars at excessive speed. "Excessive" used with relation to speed means "to exceed the authorized speed." Funk & Wagnalls' New International Dictionary.

There is no claim that the law or any rule of petitioner "authorized" any fixed rate of speed. Therefore, if there was any "authorized" speed it must have been fixed by custom which created a duty on petitioner to move cars at no higher speed. A violation of this custom would be a breach of duty, i. e., negligence. Consequently, there can be no breach of duty relating to speed except by violation of a custom; because absent a custom, "employees working in railroads yards must look out for moving cars, rather than themselves be looked out for by switching crews.

Connelley v. P. R. Co., 201 F. 54, 56;
Reading Co. v. Haldeman, 20 F. 2d 53, 55;
Cain v. Fort Worth & Denver City R. Co., 75 F. 2d 103, 106;
Sumney v. Southern R. Co., 89 F. 2d 437, 439.

The court below held that respondent "could make a submissible case by showing that the speed at which the cars were shunted in this instance was so grossly excessive as to constitute negligence, without proving the custom."

This cannot be correct, because there cannot be excessive speed without proof of a custom fixing an "authorized" speed, and ipso facto creating a duty on petitioner not to exceed it.

II.

Before custom may supersede law, it must be proved to have been definite, uniform, universal and known.

McClellan v. P. R. Co., 62 F. 2d 61, 63;
C. M. & St. P. R. Co. v. Lindeman, 143 F. 946, 949.

(a) There is no such proof in this record (R. 18, 25, 26, 27, 33, 49, 53, 57, 61, 65, 142, 154). While two witnesses testified that the "usual, customary" speed at which cars were shunted was three and a half to five miles an hour (R. 18, 142), three witnesses said there was no customary speed (R. 49, 57, 61, 65, 154). This evidence is not sufficient to establish such a custom as will supersede positive rules of law; but shows no more than a loose and variable practice.

Sickelco v. U. P. R. Co., 111 F. 2d 746;
In re Bowling Green Milling Co., 132 F. 2d 279.

III.

But even though it were conceded that the custom had been proved, the uncontradicted evidence shows that the alleged customary or usual speed was fixed solely with relation to potential damage to cars, their contents and tracks; and not with relation to possible injuries to employees, who are expected to protect themselves (R. 26, 27, 143, 146, 154).

Therefore, petitioner owed respondent no duty to limit the speed of shunted cars. Consequently, shunting them

at greater speed violated no duty owed to respondent. This Court holds there can be no actionable negligence which is not based upon the violation of a duty owed to plaintiff.

C. & O. R. Co. v. Mihas, 280 U. S. 102, 106, 74 L. Ed. 207, 211.

The opinion of the court below is in direct conflict with the Mihas Case.

IV.

(a) The sole proximate cause of his injury was respondent's own gross negligence in stepping on the track only ten or twelve feet away (R. 99) from the car which struck him. He could have seen the shunted cars coming had he but stepped but a few feet to the west. This he confessedly did not do, but looked from a point and at a time when the Burlington car completely blocked his view of the shunted cars (R. 99), and started across the track, admittedly without ascertaining whether or not cars were moving over the track (R. 99, 100).

Brady v. Sou. R. Co., 320 U. S. 476, 88 L. Ed. 239;
Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 283, 73 L. Ed. 957;
Frese v. C. B. & Q. R. Co., 263 U. S. 1, 68 L. Ed. 131, 132.

(b) There is no evidence that respondent would not have been struck by the Burlington car even though it had been struck by shunted cars moving at three and a half to five miles an hour.

The burden was on respondent to prove that the proximate cause of his injury was the shunting at excessive speed; that he would not have been injured if they had moved at "authorized" speed. Without such proof there is no evidence that petitioner could have reasonably foreseen the injury.

Brady v. Sou. R. Co., 320 U. S. 476, 88 L. Ed. 239.

ARGUMENT.

I.

This action is based upon the Federal Employers' Liability Act which requires proof by respondent of proximal causal negligence on the part of petitioner. "Liability arises from negligence, not from injury, under this Act. And that negligence must be the cause of the injury." Brady v. Sou. R. Co., 320 U. S. 476, 484, 88 L. Ed. 239, 245.

There can be no negligence without a breach of a lawful duty. Consequently, respondent was under the necessity of proving petitioner had violated a duty imposed upon it by law or custom having the force of law. Implicit in his theory of excessive speed is the predicate that there was a normal or authorized speed, and that petitioner was lawfully bound to adhere to such authorized speed. A lawful duty is created by law or by something equivalent. So, there must have been a speed authorized by law or by something equally compulsive.

It is not claimed that there is any law fixing the speed at which cars may be shunted in a switch yard. In fact, the law is just to the contrary of respondent's theory. "Ordinarily employees working in railroad yards must look out for moving cars rather than themselves be looked out for by switching crews." Cain v. Fort Worth & Denver City R. Co., 75 F. 2d, l. c. 106, and cases cited. "Indeed it follows from the nature of such employment that the duty of self-preservation has to rest on them, for no adequate protection, other than self-protection, can be afforded them. And such has been the reasonable holding of the law." Connelley v. P. R. Co., 201 F., l. c. 56; Reading Co. v. Haldeman, 20 F. 2d, l. c. 55.

There is no claim or evidence that any particular speed was authorized by a rule of petitioner. So, neither the law nor petitioner's rules fixed a normal or authorized speed.

If there was any authorized speed, it must, therefore, have been fixed by custom.

The court below erroneously held that there could be excessive speed "without proving custom." This cannot be correct, because speed becomes excessive only because it is greater than is authorized, and in this case there is nothing except custom to fix the authorized speed.

II.

Before custom may supersede law, it must be shown to have been definite, uniform, universal and known; and the burden of so proving rests upon plaintiff. Because such a custom supersedes the law, the custom must be certain in order to provide just measurements; uniform, to furnish a rule applicable to all persons; and known or notorious, to condemn a violator. C. M. & St. P. R. Co. v. Lindeman, 143 F., l. c. 949, 950.

(a) There is no proof of such a custom. One of respondent's witnesses, Brown, testified that the usual, "customary" speed was possibly from three and a half to five miles an hour (R. 18). One of petitioner's witnesses, Siebert, when asked if three and a half to five miles an hour was the "usual and customary" speed, answered: "That's about right, yes" (R. 142). Three of respondent's witnesses, Butler (R. 55, 56, 57), Tunze (61), and Burke (65), testified there was no usual or customary speed. Note: Butler (R. 55) said they "should be kicked in about the speed you could walk—three to five miles an hour, or something like that"; but he testified (R. 56, 57) that the speed at which cars were shunted depended on how far it was desired they should go.

This character of evidence is not sufficient to establish such a definite, certain, uniform custom as will supersede a positive rule of law and transfer from plaintiff to defendant the duty of looking out for plaintiff's safety.

This evidence does no more at best than show a loose and variable practice, binding upon no one and controlled by the vagaries of the individual workman. Sickelco v. U. P. R. Co., 111 F. 2d 746; In re Bowling Green Milling Co., 132 F. 2d 279.

III.

Assuming, however, the sufficiency of the evidence to establish a governing custom fixing an authorized speed, the undisputed evidence by both petitioner's and respondent's witnesses, is that the rate of speed fixed by the custom was based solely upon possible damage to cars, their contents and the track; and was not based upon possible injury to workmen whose duty it was to look out for themselves (R. 26, 27, 143, 146, 154).

The necessary and in fact the inevitable result is that petitioner owed respondent no duty to limit the speed of shunted cars by reason of this alleged custom which was not at all related to his safety. Obviously, shunting them at greater speed was not a violation of any duty to respondent.

This Court in Chesapeake & O. R. Co. v. Mihas, 280 U. S. 102, 106, 74 L. Ed. 207, 211, said:

> "If there was a violation of duty, therefore, on the part of the railway company, it was not of a duty owing to Mihas; and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was one owing to the complainant."

The opinion of the court below does not follow the Mihas Case.

IV.

(a) The sole proximate cause of respondent's injury was his own gross negligence in stepping on track 18 only ten or twelve feet from the Burlington car which struck him (R. 99). At that time and place he could not see south far enough to see whether or not cars were moving on that track (R. 99, 100); but by stepping a few feet west to avoid the blocking of his vision by that car, he could have seen the shunted cars coming. His duty so to do is admitted by him (R. 96). Knowing that any of the switch tracks might be used at any time, as he says they were in constant use (R. 96), he carelessly failed to take the slightest care for his own safety, and solely and proximately produced his injury. Atlantic Coast Line R. Co. v. Driggers, 320 U. S. 476, 88 L. Ed. 329.

In Frese v. C. B. & Q. R. Co., 263 U. S. 1, 68 L. Ed. 131, 132, recovery was sought for the death of an engineer in a collision with another train at the crossing of two railroads. It was the statutory duty of decedent to ascertain if his train could safely proceed. Plaintiff tried to avoid the consequences of her decedent's violation of duty by saying the fireman was partially to blame for the collision.

Mr. Justice Holmes, refusing to agree to this, said:

> "Whatever may have been the practice, he (the decedent) could not escape this duty, and it would be a perversion of the Employers' Liability Act * * * to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more."

(b) As respondent submitted his case solely upon the theory that he was injured by "excessive" speed, the burden was upon him to prove that it was "excessive" speed which caused his injury. He could do this only by proving

that had the speed been not excessive, he would not have been hurt. He made no effort whatever to make such proof. In other words, the burden was upon him to prove that had the shunted cars moved no faster than three and one-half to five miles an hour, he would not have been hurt. There is not the slightest evidence to support such an hypothesis.

Moreover, without such evidence there is no proof that petitioner could reasonably have foreseen personal injury as the result of shunting cars at greater speed. Respondent's injury obviously was not "the natural and probable consequence of" the alleged wrongful act, and it should not "have been foreseen in the light of attendant circumstances." It was an event "too remote to require reasonable prevision" of it. Therefore, if excessive speed be admitted, it was not the proximate cause, in whole or in part, of respondent's injury.

Brady v. Sou. R. Co., 320 U. S. 476, 483, 88 L. Ed. 239, 245.

For these reasons, respondent failed to make a submissible case.

Respectfully submitted,

ARNOT L. SHEPPARD,
Attorney for Petitioner,
302 Union Station,
St. Louis, Missouri.

Office - Supreme Court, U. S.
FILED
DEC 27 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 632

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Petitioner,

vs.

A. T. SCHORB,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI

WILLIAM H. DEPARCQ,
2535 Rand Tower,
Minneapolis 2, Minnesota,
Attorney for Respondent.

Of Counsel:
ROBT. J. McDONALD,
DONALD T. BARBEAU,
2535 Rand Tower,
Minneapolis 2, Minnesota.

HARVEY B. COX,
St. Louis, Missouri.

Hayward-Court Brief Printing Co., Minneapolis 15, Minn.

INDEX

	Page
I. Preliminary Statement	1
II. Statement of Facts	2
III. Points and Authorities	8
IV. Argument	10
The trial court properly submitted the case to the jury and the evidence is sufficient to sustain the verdict	10
1. The petitioner owed respondent the duty to furnish a reasonably safe place to work	10
2. An evidentiary custom need not be pleaded	11
3. The question of whether excessive speed proximately caused the accident was for the jury	15
V. Conclusion	23

CASES CITED

American Car & Foundry Co. v. Uss, 211 F. 862 9
Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 S. Ct. 1062 ..... 8, 10, 11, 18
Blair v. Baltimore & Ohio R. Co., ... U. S. ..., 65 S. Ct. 545 ..... 10, 18
Brum v. Wabash R. Co., 335 Mo. 876, 74 S. W. (2d) 566 11
Chesapeake & Ohio R. Co. v. Mihas, 280 U. S. 102, 50 S. Ct. 42 ..... 19, 20, 21
Chicago Great Western Ry. Co. v. Egan, 159 F. 40 9
Chicago Great Western Ry. Co. v. Minneapolis, St. P. & S. S. M. R. Co., 176 F. 237 ..... 9, 12
Chicago Great Western Ry. Co. v. Beecher, decided July 23, 1945, reported in 150 F. (2d) 394 13
Chicago, St. P., M. & O. Ry. Co. v. Kulp (8th Cir.), 102 F. (2d) 352, 133 A. L. R. 1445 14
Dunagan v. Appalachian Power Co., 33 F. (2d) 876 9
Elmer v. Mutual S. S. Co., 114 Minn. 257, 130 N. W. 1104 ..... 8, 13
Glantz v. C., B. & Q. R. Co., 90 Neb. 606, 134 N. W. 242 ..... 9, 15
Goslin v. Kurn, 351 Mo. 395, 173 S. W. (2d) 79 ..... 9, 11, 14, 15
Halges v. Central R. Co. of N. J., 58 F. (2d) 169, cert. den. 287 U. S. 607 ..... 10, 19
Hogan v. Fleming, 317 Mo. 524, 297 S. W. 404 ..... 9, 13
In re Bowling Green Milling Co., 132 F. (2d) 279 15
Jacob v. City of New York, 315 U. S. 762, 62 S. Ct. 854 18
Kurn v. Stanfield (8th Cir.), 111 F. (2d) 469 ..... 10, 19
Lowden v. Hanson (8th Cir.), 134 F. (2d) 348 ..... 8, 11
McComb v. Atchison, T. & S. F. Ry. Co., 110 Cal. App. 303, 294 Pac. 81, cert. den. 283 U. S. 838, 51 S. Ct. 486 ..... 9, 15
Myers v. Pittsburgh Coal Co., 233 U. S. 184 ..... 8, 11
New York Central R. Co. v. Devine, 23 F. (2d) 588 ..... 10, 19
Owens v. Union Pacific R. Co., 319 U. S. 715, 63 S. Ct. 1271 ..... 10, 18
Palmer, et al., v. Hoffman, 318 U. S. 109, 63 S. Ct. 477 13
Parker v. Cushman, 195 F. 715 9

Page
Payne v. Connor, 274 F. 497 ..... 10, 19
Payne v. Connor, 274 F. 497 19
Sears Roebuck & Co. v. Peterson, 76 F. (2d) 243 22
Sickelco v. Union Pacific R. Co., 111 F. (2d) 746 15
Silver Falls Timber Co. v. Eastern & Western Lumber Co., 149 Ore. 126, 40 Pac. (2d) 703 15
Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409 .. 10, 17, 18
Terminal R. Assn. v. Farris, 69 F. (2d) 779, 785 22
Texas & Pacific R. Co. v. Behymer, 189 U. S. 468, 23 S. Ct. 622, 68 A. L. R. 1400 ..... 9, 11
Tiller v. Atlantic Coastline R. Co., 318 U. S. 54, 63 S. Ct. 444 .... 10, 18
Timmermann v. St. Louis Architectural Iron Co., 318 Mo. 421, 1 S. W. (2d) 791 ..... 9, 12, 13
Vogel v. St. Louis Merchants Bridge Terminal Ry. Co. (Mo. App.), 16 S. W. (2d) 624 13
White's Admr. v. Kentucky Public Elevator Co., 186 Ky. 91, 216 S. W. 837 ..... 9, 13, 15

TEXTS CITED

38 Am. Jur., Sec. 317, p. 1016 ..... 9, 13
25 C. J. S., "Customs and Usages," Sec. 32 ..... 9, 12
Wigmore, Evidence, Sec. 2053 9

STATUTES CITED

Rule 43 (a) of the Rules of Civil Procedure 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 632

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Petitioner,

vs.

A. T. SCHORB, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI

I.

PRELIMINARY STATEMENT

(Figures in parentheses refer to pages of the record.)

This is a petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above case on October 19th, 1945, with a rehearing denied on November 7th, 1945. The opinion in the Circuit Court of Appeals is reported in 151 F. (2d) 361.

The absence of any attempt in petitioner's brief to review the evidence fairly and impartially necessitates an additional statement which, avoiding repetition, will be supplementary only. Petitioner's brief is characterized by an omission of vital and determinative facts; only the evidence favorable to the petitioner has been selected for emphasis. Conflicting evidence has been ignored.

The sole question is, was the evidence sufficient to permit a jury finding that petitioner's negligence in kicking the cars at an excessive speed proximately contributed to cause the accident? Convinced that there was an abundance of such evidence, we will address ourselves to that sole proposition, but to determine the propriety of the speed the entire factual background must be considered. Construed favorably to respondent the evidence presented the following picture:

II.

STATEMENT OF FACTS

A perusal of the plat (Resp.'s Ex. 11, 129) will aid the court in understanding the *locus in quo*. Cabin 1 consisted of the yard master's office or shanty and the yard clerk who had charge of the bills was located there (86). It was necessary for employees, especially switch foremen, to cross the tracks to cabin 1 continuously all day long in order to obtain instructions and to get the bills (96). At the time of the accident a larger and newer yard office was being constructed which, after its completion and as it existed at the time of the trial, appears in Petitioner's Exhibit 3 (175). However, at the time of the accident the new construction was under way (86).

The yard office, or cabin 1, had been moved northerly and was at the place on the plat designated as, "Cabin 1, temporary location" (68). It was located immediately adjacent to track 17, which was the first of the seven eastbound receiving tracks. All the tracks extended in a general northerly and southerly direction. The first track adjacent to cabin 1 was 17 and the second track was number 18, which was immediately involved in the accident.

West and slightly to the south of cabin 1 there appears upon the plat a rectangle with a capital "B," which indicates the position of the Burlington car which struck re-

spondent. It will be noted that this car is immediately north of one frog and immediately south of another and also on a curve. It was not intended to leave it there, because it was "on the frog" or "frogged," and was fouling tracks 17, 18 and 19 so that none of them could be used with the standing car in that position (101). As counsel said, "It gummed up the works" (102). When kicked, it had failed to roll far enough to clear the frogs and the switches.

It appeared without dispute that switchmen would be crossing these three tracks all day long on their way to and from cabin 1 (96). These tracks were known as receiving tracks as distinguished from classification tracks. Ordinarily cars and trains would be taken in on those tracks and removed from them under engine control (16) and they would be used to switch and classify cars very seldom (17). Sometimes there would be months when they would not kick a car in there (51) and maybe the next week they would push a car in there and then for months they would not put cars in there (51). Cars would sometimes be kicked onto these tracks but very seldom (61). Respondent did not expect any cars to go in on 18 (100). They could not be called open tracks (62).

Tracks 17, 18 and 19 were used occasionally for kicking a car (17), but there was a usual and customary speed for this movement of from 3½ to 5 or 6 miles an hour (18) and it should be held down to that (27). It is different on a classification track where they switch faster (27, 28). They would not kick them on track 18 at the same rate of speed as on the classification track (23). Tracks 17, 18 and 19 were a little down hill and the cars should be kicked in about at the speed you could walk—three to five miles an hour—and they were customarily kicked slower on those tracks than at other points (55). The accident occurred about 10:18 A. M. on September 11th, 1943. Respondent was switch fore-

man on the ice house job. After completing his work he returned with his engine heading southerly on the track known as the easy way to the ice house.

The engine stopped northwesterly of cabin 1 (84, 85). Respondent, intending to go to the yard office for further instructions, met Mr. Seibert, the yard master, and held a conversation with him at approximately the point marked with the circle and the "X" inside (Resp.'s Ex. 11, 129). Seibert and respondent were standing west of the center of the Burlington car and about 30 feet away from it. The yard master instructed respondent to take care of the L. & N. track and stated, "Go to the shanty and get your bills and get out with one track L. & N." (86). Respondent answered, "I will get my bills while I am stopped" (105). The time was short and respondent had a spare minute and went to get the bills (96).

He walked northeasterly toward the Burlington car (86). He looked down the lead and noticed that the 18 switch was not open (87). When he was about 10 feet south of the north end of the Burlington car and 3 feet west of it, he looked down south toward the lead and toward old cabin 1 and could see 18 switch or 17 lead switch, the master switch (97), which is the switch where 17, 18 and 19 started, and the switches were all lined down the lead (98). The lead is track 39-40, which is east of the place where Seibert and respondent had been standing (Resp.'s Ex. 11, 129).

Respondent saw cars down the lead south of 19 switch, between cabin 1 and the B. & O. crossing, but did not know whether they were moving or standing still (98). He then walked northerly until he was about 10 feet north of the Burlington car (86, 87). A ten-foot clearance would give you plenty of time to get out of the way with a minor impact at 3, 4 or 5 miles an hour (87, 88). The company rule provides that men should walk "a sufficient distance beyond the end

of such cars to protect against movement from other end" (30). Experienced switchmen regard eight or ten feet as sufficient clearance for a movement from 3½ to 6 miles an hour (27, 28); the customary clearance where respondent was injured at a normal rate of speed would be "possibly eight to ten feet, twelve" (21).

When about ten or twelve feet north of the Burlington car (99), he then turned and started east across track 18 (99). He again looked to the south but the Burlington car had his view blocked (99). He didn't know there was anything coming from that direction (99). When he was midway between the rails, Seibert hollered, "Oh, Al" (100), and respondent kind of turned to the south and at the same time there was a terrific crash (100). The car jumped or leaped up (86, 87); the impact was great and unusual and violent (88); the witness Sauerhage from 275 feet away saw the whole car jump off the rails (78).

Respondent testified that when he swung around he was hit in the snap of his fingers (87, 88) and that he was struck in the chest by the drawbar and knocked onto his back (101). A car and a half leaped over his body and after they slowed he grabbed onto the underrigging and held on and was dragged (86, 87). The crash was so sudden he could not get out of the way (87). He said it was a terrific crash (100) and the noise came and his body was struck all at the same time (101). He was rolled under the cars like a rubber ball (101). The cars leaped up and the next thing respondent heard was the bump on the ground and he was rolling underneath (100). Respondent testified that he did not expect the cars (100) and that during his twenty-two years of experience he had never seen a car hit that hard at that point (88).

The witness Butler threw the switches and saw the cars pass right in front of him (49). He said they were going

at a pretty good rate of speed, nothing unusual about the speed, but he wouldn't want to get on them and they were going plenty fast, faster than he could walk (49). He couldn't remember whether he had ever observed cars kicked in on those receiving tracks as fast as it was done on this occasion (56).

Tunze, a switchman, was about 200 feet away and was attracted by the impact (59) which he said was a louder one than they were used to hearing (60). He described the movement itself as not a usual movement (61).

Sauerhage was the pin puller who cut the cars off and he placed their speed between 12 and 15 miles per hour (72). The track had some gravity and when they struck the Burlington car they were also going between 12 and 15 miles an hour (72). He watched the cars until the impact when the Burlington car raised up in front, "jumped" (72). He would call it a pretty abnormal impact (72). In view of the fact that these three cars were cut off 150 feet from the Burlington car, he would say, at that close distance, the speed was unusual (72, 73).

The Burlington car which was standing on the curve and the frog was loaded with merchandise weighing 9,369 pounds (66). The three cars kicked in were: A Milwaukee car loaded with 82,400 pounds, a Northern Pacific car loaded with 78,100 pounds, and an L. & N. car which was empty (66). When the collision occurred, the Burlington car was derailed and ran along the ties and the roadbed 115 feet before coming to a stop (59). It rolled in a derailed condition for from 115 to 120 feet (73). The northwest wheel went plumb off on the ground and travelled 70 feet on the ground (80, 81). The roadbed was tore up quite a bit and a pretty good stretch of it was torn up (50). Generally cars are not kicked hard enough to derail another car (32).

George C. Seibert testified for petitioner. He was in charge

of the entire yard and issued all instructions to assistant yard masters, foremen, inspectors, and all employees in the yard (137). He had charge of all incoming and outbound trains, the inspection of cars and their switching (137). He had twenty-five years of experience (131). He testified that after respondent turned and walked toward the yard shanty, he directed his attention elsewhere (138) until he just happened to turn and see respondent in the middle of the track; he called, "Oh, Al," but it was too late (138, 139). He did not dispute the respondent with reference to his route or position or purpose (138, 139). He actually saw the accident, that is, the collision (139). When asked whether the cars were going 12 to 15 miles per hour, he said they were not moving at such a high rate of speed (139). He refused to fix the position of the cars (141), but was impeached by his deposition wherein he stated that his best estimation was 3½ to 5 miles per hour, that this was the proper and normal speed, that it was the usual and customary speed, and that 3½ to 5 miles an hour was the speed they should have been going (142). He admitted that the above answers in his deposition were true and correct (142). He admitted also that when his deposition was taken he had testified that as the general yard master, he would say that the highest speed, under good railroad practice and under the circumstances existing, that they should have been kicked with safety, was about 3 to 3½ miles per hour (143). He admitted that this was true but said that by "safety" he was referring to lading (133, 134).

He testified that 15 to 16 miles an hour would be dangerous to equipment and property but not to persons around (144, 145). He admitted that such a speed might derail a car (144). He further admitted that the Burlington car actually "leaped," but claimed it did not derail until it rolled 15 or 16 feet from where it was standing (145).

When Sauerhage pulled the pin, the cars were just barely moving (74). The practice is for the pin puller to pull the pin when the slack is bunched and the cars start to move. When the desired speed is attained, the foreman or some other switchman then signals the engineer to stop. When the engineer stops the disconnected cars roll away on their own momentum. When the three cars were separated at a speed of from 12 to 15 miles per hour (72), they were only about 150 to 175 feet from the Burlington car (75).

Although Mr. Klein investigated the accident and interviewed the various witnesses (186), yet petitioner presented no explanation for the derailment and the record is devoid of any enlightenment on the subject except the claim of respondent that it must have been the result of impact that was exceptionally hard (170). The only direct testimony on the subject was that of Sauerhage who said that the whole car jumped and that the derailment occurred immediately as soon as the car was hit (78).

No witness, although two or three actually saw the accident, testified that respondent did not allow the customary clearance required by rule and practice in crossing the track near a standing car.

III.

POINTS AND AUTHORITIES

1. The petitioner owed respondent the duty to furnish a reasonably safe place to work.

Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 S. Ct. 1062.

Myers v. Pittsburgh Coal Co., 233 U. S. 184.

Lowden v. Hanson (8 Cir.), 134 F. (2d) 348.

2. Evidence of custom and practice was admissible.

Texas & Pacific R. Co. v. Behymer, 189 U. S. 468, 23 S. Ct. 622, 68 A. L. R. 1400.

Dunagan v. Appalachian Power Co., 33 F. (2d) 876.

Elmer v. Mutual S. S. Co., 114 Minn. 257, 130 N. W. 1104.

38 *Am. Jur.,* Sec. 317, p 1016.

An evidentiary custom need not be pleaded.

Timmermann v. St. Louis Architectural Iron Co., 318 Mo. 421, 1 S. W. (2d) 791.

Hogan v. Fleming, 317 Mo. 524, 297 S. W. 404.

25 *C. J. S.,* "*Customs and Usages,*" Sec. 32.

The testimony of one witness is sufficient to establish an evidentiary custom.

Goslin v. Kurn, 351 Mo. 395, 173 S. W. (2d) 79.

McComb v. Atchison, T. & S. F. Ry. Co., 110 Cal. App. 303, 294 Pac. 81, cert. den. 283 U. S. 838, 51 S. Ct. 486.

Glantz v. C., B. & Q. R. Co., 90 Neb. 606, 134 N. W. 242.

Wigmore, Evidence, Sec. 2053.

There is an important distinction between a binding custom which constitutes a usage of trade and an industrial practice which is admissible in evidence as evidentiary of negligence.

White's Admr. v. Kentucky Public Elevator Co., 186 Ky. 91, 216 S. W. 837.

Chicago Great Western Ry. Co. v. Egan, 159 F. 40.

Parker v. Cushman, 195 F. 715.

American Car & Foundry Co. v. Uss, 211 F. 862.

Chicago Great Western Ry. Co. v. Minneapolis, St. P. & S. S. M. R. Co., 176 F. 237.

Texas & Pacific R. Co. v. Behymer, supra.

3. The evidence was sufficient to make the question of excessive speed one for the jury.

Tiller v. Atlantic Coastline R. Co., 318 U. S. 54, 63 S. Ct. 444.

Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 S. Ct. 1062.

Owens v. Union Pacific R. Co., 319 U. S. 715, 63 S. Ct. 1271.

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 64 S. Ct. 409.

Blair v. Baltimore & Ohio R. Co., ... U. S. ..., 65 S. Ct. 545.

In analogous cases recovery has been sustained on the ground of excessive speed.

Kurn v. Stanfield (8 Cir.), 111 F. (2d) 469.

Halges v. Central R. Co. of N. J., 58 F. (2d) 169, cert. den. 287 U. S. 607.

New York Central R. Co. v. Devine, 23 F. (2d) 588.

Payne v. Connor, 274 F. 497.

IV.

ARGUMENT

The Trial Court Properly Submitted the Case to the Jury and the Evidence Is Sufficient to Sustain the Verdict.

Citation of authority is unnecessary for the elementary propositions that the weight and credibility of the testimony are for the jury, that conflicts in evidence should be resolved in favor of the respondent, and the evidence is to be viewed in its aspects favorable to the respondent's case.

1. The petitioner owed respondent the duty to furnish a reasonably safe place to work.

It is the duty of a railroad company to furnish to its employees a reasonably safe place in which to do their work.

This duty is a continuing one and is non-delegable and extends to all places where the employee may reasonably be expected to go in the course of his work.

The most recent expression of the general principle applicable here was by the Supreme Court in the case of *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, 63 S. Ct. 1062, wherein the court said:

> "At common law the duty of the employer to use reasonable care in furnishing his employes with a safe place to work was plain. That rule is deeply engrained in federal jurisprudence. * * * That duty of the carrier is a 'continuing one' (*Kreigh v. Westinghouse C. K. & Co., supra*, 214 U. S., page 256, 53 L. Ed. 984) from which the carrier is not relieved by the fact that the employe's work at the place in question is fleeting or infrequent."

The above quoted rule represents the overwhelming weight of authority in the federal courts and the courts of Missouri are committed to the same proposition. *Myers v. Pittsburgh Coal Co.*, 233 U. S. 184; *Lowden v. Hanson*, 134 F. (2d) 348; *Goslin v. Kurn*, 351 Mo. 395, 173 S. W. (2d) 79; *Brum v. Wabash R. Co.*, 335 Mo. 876, 74 S. W. (2d) 566.

2. An evidentiary custom need not be pleaded.

The general principle applicable here was well expressed in *Texas & Pacific R. Co. v. Behymer*, 189 U. S. 468, 23 S. Ct. 622, as follows:

> "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

It was not necessary for respondent to plead that there was a custom as to the speed in switching cars in order to prove such a fact. The ultimate fact to be proved was that of negligence and evidence of a departure from the usual and

customary speed merely tended to prove the ultimate fact pleaded.

The rule is stated in 25 *C. J. S., "Customs and Usages,"* Sec. 32, that:

> "Where a custom or usage is relied upon evidentially and only as evidence of some other fact in issue, it need not be pleaded"

In *Chicago Great Western Ry. Co. v. Minneapolis, St. Paul & S. S. M. R. Co.,* 176 F. 237, 20 Ann. Cas. 1200, the Eighth Circuit Court of Appeals held that in the case of a doubtful act, evidence of the ordinary practice and usual custom of ordinarily prudent persons under similar circumstances is admissible on the issue of negligence in the performance or omission of the act. The court, 176 F., at page 242, said:

> "The presumption was, as has already been said, that these operators were of ordinary intelligence and prudence. The best test of reasonable care in a given case is evidence of the degree of care which such persons commonly exercise under similar circumstances where such evidence is available. Hence, upon the question of negligence or none, evidence of the ordinary practice and of the uniform custom, if any, of such persons in the performance under similar circumstances of acts like those which are alleged to have been done negligently, is generally competent evidence, because it presents to the jury a correct standard for the determination of the issue."

The Supreme Court of Missouri in *Timmermann v. St. Louis Architectural Iron Co.,* 318 Mo. 421, 1 S. W. (2d) 791, said:

> "The failure to submit the question of existence of a custom to brace the beam was not a fatal infirmity for still another reason. The existence of the custom was not a substantive part of plaintiff's cause of action. In the opinion in the very recently decided case of *Hogan v. Fleming* (Mo. Sup.), 297 S. W. loc. cit. 408, it was said:
>
> "'It has been ruled in this state that, inasmuch as

custom is not substantive in character, but merely evidentiary of defendant's negligence, it is not necessary that such custom shall be pleaded.'

"Numerous cases are cited supporting that utterance, among them *Brunke v. Telephone Co.*, 115 Mo. App. 36, 90 S. W. 953; *Caldwell v. Payne* (Mo. Sup.), 246 S. W. 312; *Gordon v. Kansas City R. Co.*, 222 Mo. 516, 536, 121 S. W. 80; *Cassin v. Lusk*, 227 Mo. 663, 678, 210 S. W. 902. The custom, as indicative of the conduct of prudent men, was probative in character, but it did not supplant or change the rule of negligence established by substantive law. It was not necessary that it be submitted as a hypothetical fact."

To exactly the same effect, in addition to the authorities cited in the *Timmermann* case, *supra*, see *Hogan v. Fleming*, 317 Mo. 524, 297 S. W. 404; *Vogel v. St. Louis Merchants Bridge Terminal Ry. Co.* (Mo. App.), 16 S. W. (2d) 624; *Elmer v. Mutual S. S. Co.*, 114 Minn. 257, 130 N. W. 1104; *White's Admr. v. Kentucky Public Elevator Co.*, 186 Ky. 91, 216 S. W. 837; and 38 *Am. Jur.*, Sec. 317, p. 1016. It may be noted that in *Hogan v. Fleming, supra*, suit was brought for personal injuries and the plaintiff was allowed to show a custom as to the stopping of street cars. Defendant's contention that because the custom was not pleaded the evidence was inadmissible was rejected by the Supreme Court of Missouri.

Under Rule 43 (a) of the Rules of Civil Procedure, the admissibility of evidence is governed by the rule applied in the federal courts or in the courts of the state in which the federal court sits, whichever favors its reception. Rule 43 (a) has been followed and applied by the Eighth Circuit Court of Appeals in *Chicago Great Western Ry. Co. v. Beecher*, decided July 23rd, 1945, and reported in 150 F. (2d) 394, and also by the Supreme Court of the United States in *Palmer, et al., v. Hoffman*, 318 U. S. 109, 63 S. Ct. 477.

Considering the evidence in the light most favorable to respondent, it was more than sufficient to establish the usual and customary speed used in switching cars in the yard and on the track in question. Rollie T. Brown, one of petitioner's switchmen, testified the usual and customary speed of switching movements on these receiving tracks should be 3½ to 5 or 6 miles an hour (18, 27). Respondent testified to the same effect (87, 88). George C. Seibert, petitioner's yard master for the entire yard, testified in his deposition that the proper and normal and customary speed would be from 3½ to 5 miles per hour and that this was the speed they should have been going (142). He further said that the highest speed they should have been kicked with safety was about 3 to 3½ miles per hour (142, 143).

The testimony of Seibert was substantive evidence under the rule established in the leading case of *Chicago, St. P., M. & O. Ry. Co. v. Kulp* (8 Cir.), 102 F. (2d) 352, 133 A. L. R. 1445.

The evidence of one witness alone is sufficient to prove a custom. In the recent case of *Goslin v. Kurn,* 351 Mo. 395, 173 S. W. (2d) 79, plaintiff attempted to prove that defendant failed to dim a headlight in violation of a custom to dim headlights in the yards. As to the custom plaintiff testified that "quite a few" of the road engines dimmed their headlights in the yards, but he did not know what percentage. Plaintiff was the sole witness to testify as to such custom and he was impeached to a certain extent by a statement he had given a claim agent for defendant. In holding there was sufficient evidence to establish a custom, the court said:

> "In former days it was held by a few courts that one witness was not enough to establish the existence of a custom, but it is now well settled that a custom may be proved as any other fact."

The evidence in the Goslin case falls far short of that produced in the case at bar. There the sole witness stating

there was a custom was the plaintiff and he was impeached both by his statement and on his cross examination. In the case at bar the custom was established by respondent and by at least two of petitioner's employees. None of their testimony as to custom was impeached.

To the same effect as the rule in the *Goslin* case, see *McComb v. Atchison, T. & S. F. Ry. Co.*, 110 Cal. App. 303, 294 Pac. 81, cert. den. 283 U. S. 838, 51 S. Ct. 486; *Dean Wigmore, Evidence*, Sec. 2053; *Glantz v. Chicago, B. & Q. R. Co.*, 90 Neb. 606, 134 N. W. 242; and *Silver Falls Timber Co. v. Eastern & Western Lumber Co.*, 149 Ore. 126, 40 Pac. (2d) 703.

Cases such as *Sickelco v. Union Pacific R. Co.*, 111 F. (2d) 746, and *In re Bowling Green Milling Co.*, 132 F. (2d) 279, relied on by petitioner are cases wherein a custom was relied on as constituting a part of a contractual obligation or as a trade usage and are not authority for the proposition advanced by petitioner in this case. The true distinction was pointed out in *White's Admr. v. Kentucky Public Elevator Co.*, 186 Ky. 91, 216 S. W. 837, where the court said:

> "The rule requiring a custom to be pleaded before it may be shown in evidence applies where there is an effort to incorporate into a contract a local custom as a binding stipulation between the parties * * *, but has no application where the purpose is, as here, to prove the ordinary and usual way commonly employed to do a certain thing in order to determine whether or not it has been negligently done."

3. The question of whether excessive speed proximately caused the accident was for the jury.

A study of the evidence produced on the trial conclusively shows that the negligent and excessive speed with which petitioner's cars were kicked was the proximate cause of respondent's injuries. It appeared without dispute that the

switchmen, including respondent, would be crossing the tracks all day long on their way to and from cabin 1 (96). These tracks were known as receiving tracks as distinguished from classification tracks. They were seldom used to switch and classify cars (17). It was necessary for respondent to cross these tracks continually throughout the day to receive his orders. Respondent did not expect any cars to go in on 18 (100). It was testified that the usual and customary speed for this movement was from 3½ to 5 or 6 miles an hour (18). Respondent was crossing the yards to go to the yard office for further instructions. He met Mr. Seibert, the yard master, and held a conversation with him (129). After respondent received his orders he walked northeasterly toward the Burlington car (86). He looked down the lead and noticed that the 18 switch was not open (87). He gave himself a ten-foot clearance while walking north of the Burlington car (87, 88). He testified that with a ten-foot clearance you would have plenty of time to get out of the way with a minor impact of 3, 4 or 5 miles an hour (87, 88). It was undisputed that experienced switchmen regard eight or ten feet as sufficient clearance for a movement from 3½ to 6 miles an hour (27, 28) and that this was the customary clearance (21). While respondent was midway between the rails there was a terrific crash (100). The car jumped or leaped up (86, 87); the impact was great and unusual and violent (88); the witness Sauerhage from 275 feet away saw the whole car jump off the rails (78).

Respondent testified that during his twenty-two years of experience he had never seen a car hit that hard at that point (88).

When the collision occurred, the Burlington car was derailed and ran along the ties and the roadbed 115 feet before coming to a stop (59). It rolled in a derailed condition for from 115 to 120 feet (73).

Petitioner presented no explanation for the derailment and the record is devoid of any enlightenment on the subject, except the claim of respondent that it must have been the result of an impact that was exceptionally hard (170). The only direct testimony on the subject was that of Sauerhage who said that the whole car jumped and that the derailment occurred immediately as soon as the car was hit (78). No witnesses were produced by petitioner who testified to the effect that respondent did not allow the customary clearance required by rule and practice in crossing a track near a standing car.

Considering the evidence in the light most favorable to respondent, the conclusion is inescapable that the accident would not have occurred had not the petitioner shunted in the cars at a negligent and excessive rate of speed. Had the cars been kicked in at the usual and customary speed of 3½ to 5 or 6 miles an hour, the respondent would have had plenty of time to step out of the way of the Burlington car. Respondent was crossing these tracks all day and relied on the petitioner to perform its duties in the usual and customary manner. He knew that cars were not kicked in on these receiving tracks at a high rate of speed and under those circumstances allowed himself all the leeway that was necessary. It is clear that on the undisputed evidence the question of petitioner's negligence and the question of proximate cause were for the jury and the verdict of the jury should not be disturbed. As said in the case of *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence

> and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * (Citing cases.) * * * *That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*" (Italics ours.)

In a series of recent decisions the Supreme Court of the United States has emphatically disapproved the practice of directing verdicts in F. E. L. A. cases. That court has held that questions of negligence should almost invariably be submitted to juries in this type of litigation, and that under no circumstances should the courts deprive the injured employee of a jury trial in a "close or doubtful case." The modern trend was initiated by the *Tiller* case, *post*, and the latest utterance was in the *Blair* case, *infra*. *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, 67, 63 S. Ct. 444; *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062; *Owens v. Union Pacific R. Co.*, 319 U. S. 715, 63 S. Ct. 1271; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409; *Blair v. Baltimore & Ohio R. Co.*, ... U. S. ..., 65 S. Ct. 545; *Jacob v. City of New York*, 315 U. S. 762, 62 S. Ct. 854.

In the *Tiller* case, *supra*, the deceased was struck by a railroad car at night and killed. The accident happened on a dark night and the deceased was killed by the rear end of a train backing up. The accident happened in a yard. No warning was given. The court said:

> "We cannot say that a jury could not reasonably find negligence from the evidence which showed such an unprecedented departure from the usual custom and practice in backing cars without giving 'adequate warning of movement.'"

In the case at bar, also, the speed was unprecedented. In his twenty-two years of experience, the respondent had seen nothing like it and other witnesses testified that it should have been from 3½ to 5 miles an hour, whereas, on the testimony of the switchman who made the cut and separated the cars, it was actually from 12 to 15 miles per hour (72).

In analogous cases recovery has been sustained on the ground of excessive speed. See *Kurn v. Stanfield* (8 Cir.), 111 F. (2d) 469; *Payne v. Connor,* 274 F. 497; *New York Central R. Co. v. Devine,* 23 F. (2d) 588; *Halges v. Central R. Co. of N. J.,* 58 F. (2d) 169, cert. den. 287 U. S. 607.

In the *Kurn* case, *supra,* where an employee was struck and run over while crossing the track, decided before the *Tiller* case, the Circuit Court of Appeals rejected a contention similar to that advanced by petitioner here. There as here the petitioner relied upon the *Mihas* case, which will be distinguished later in this brief. The Circuit Court, however, held that the doctrine of the *Mihas* case could have no application where the railroad company either by rule or by practice had set up some standard upon which employees could justifiably rely, and said:

> "It is true that railroad employes, particularly those working in yards, must as a part of their duty exercise due care for their own safety. But employes are entitled to rely upon rules and customs which determine the standards of what they must anticipate."

In the case of *Payne v. Connor, supra,* plaintiff while crossing the tracks was struck by a cut of cars which had been put in motion by being struck by four kicked cars. There was evidence that the kicked cars were moving at a speed of from 10 to 15 miles an hour and that while defendant had no rules limiting the speed, the usual and reasonable speed was from 4 to 6 miles an hour. The court, in discussing the question of insufficient brakes and speed, stated:

> "But if it be assumed that the insufficient brakes upon the cars in no way contributed to the plaintiff's injury, and that the sole cause was the excessive speed at which they were kicked upon the still cars, it cannot be said, as a matter of law, that the plaintiff assumed the risk of injury from such a source of danger, for the evidence shows that the act of kicking cars at such a rate of speed into still cars was an unusual occurrence, a departure from the ordinary conduct of the business, so that the question, in any view of the case, was one for the jury to pass upon."

In its attempt to escape petitioner contends that the usual and customary switching speed on the receiving track (3½ to 6 miles per hour) was designed solely to protect rolling stock and lading. It would be a strange system of jurisprudence, indeed, that would sanction such an argument. Any speed sufficient to derail a car and tear up the roadbed would obviously be dangerous to the life and limb of any employee working in the immediate vicinity. A glance at the plat and the photographs will disclose that the tracks, switches and buildings are in close proximity to each other, and with employees required to cross the tracks continuously and to work on and about them, throwing switches, climbing cars, and passing to and from the various shanties and buildings, collisions and derailments must necessarily be extremely hazardous, not only to property, but to human life as well. The contention of petitioner is the very negation of that humanitarian philosophy which has been said by the courts to be the pervading spirit of the Federal Employers' Liability Act, which requires the company to be at least equally solicitous for the safety of its employees as for the preservation of its property.

Petitioner places its principal reliance upon *Chesapeake & Ohio R. Co. v. Mihas*, 280 U. S. 102, 50 S. Ct. 42. The doctrine of the *Mihas* case is inconsistent with that of the *Tiller, Owens, Bailey* and *Blair* cases, and it is noteworthy that *Chesapeake & Ohio R. Co. v. Mihas* has never been cited or

followed on the question of negligence by the Supreme Court of the United States.

However that may be, whether overruled or not, the facts render it distinguishable. It was tried and presented on an altogether different theory. The plaintiff in that case in order to get from his house on one side of the track to his speeder car upon the other attempted to climb over a coal car standing with a number of others. While he was doing so other cars were switched against the coal car, at 4 or 5 miles an hour, which was not unusual, and not as here at 12 to 15 miles an hour which was very unusual. There is no evidence in the *Mihas* case that the car was struck so violently as to derail it. Furthermore, the custom and practice relied upon in the *Mihas* case existed only in favor of a third party, not the plaintiff. Mihas relied upon a previous custom and practice to warn third persons engaged in unloading operations before moving the cars about which they were working. He did not claim there was any custom or practice to warn employees before striking such cars. Mihas was an employee and not a third party and thus failed to bring himself within the protected class to whom the duty was owing.

In the *Mihas* case the employee was crossing over the coal car and was not crossing the tracks at the place where they were openly, frequently, and notoriously used by employees all day long in coming from and going to the yard master's office. There was no evidence that the employees in charge of the switching crew could possibly have anticipated the presence of Mihas. In fact, the court said they had no reason to believe that Mihas might be in a position of danger, and added:

> "In the absence of such knowledge or ground for belief, they were not required to warn Mihas of the impending switching operation or take other steps to protect him."

In the case at bar it is undisputed that the receiving tracks in front of the yard shanty were used as a thoroughfare continually all day long, especially by switch foremen in getting their orders. In the *Mihas* case, the track involved was a switch track and not a receiving one, and in the *Mihas* case the custom or duty to warn was not owing to employees. In the case at bar the duty to warn, relied upon so heavily in the *Mihas* case, was not even submitted to the jury and is not really involved. Respondent here predicates his recovery upon excessive speed which was abundantly established. If anything else beside speed caused the derailment the record is barren of evidence on the subject. Petitioner could only suggest various theories such as the part of shoe or some other undiscoverable object. A close examination and inspection was made of the wheels, the rails, the roadbed, and other equipment, and with all of its experience and its investigation and its experts the petitioner offered no evidence on the subject. This court will not guess and speculate in petitioner's favor to find some cause it was unable to find by evidence. See *Terminal R. Assn. v. Farris*, 69 F. (2d) 779, 785; *Sears Roebuck & Co. v. Peterson*, 76 F. (2d) 243.

We shall not further waste the time of this court refuting the perfectly absurd contention that excessive speed and the attendant danger of derailment constituted a threat to equipment which should be avoided but not to human life. The F. E. L. A. imposes liability for "negligence." The duty to exercise ordinary and reasonable care is imposed thereby, custom or no custom. That respondent relied upon petitioner's performance of that duty appears sufficiently from his testimony that he allowed the usual and customary clearance of about ten feet (86, 87) because it would give you plenty of time to get out of the way with an impact at 3, 4 or 5 miles an hour (87-88). In the judgment of experienced switchmen

eight to ten feet was sufficient clearance to permit passage in safety in the event of a reasonably foreseeable impact at 3½ to 6 miles an hour (27, 28).

V.

CONCLUSION

A reversal of this case upon purely technical grounds would be a tragedy from the standpoint of respondent whose injuries were so serious and permanent that they were not questioned at any stage of the proceedings. The petition in this case is so wholly lacking in merit as to almost render suspect the motives of experienced counsel in taking it. We submit that in furtherance of justice this court should deny the petition for writ of certiorari and uphold the judgment of the court below.

Respectfully submitted,

WILLIAM H. DEPARCQ,
2535 Rand Tower,
Minneapolis 2, Minnesota,
Attorney for Respondent.

Of Counsel:
ROBT. J. McDONALD,
DONALD T. BARBEAU,
2535 Rand Tower,
Minneapolis 2, Minnesota.

HARVEY B. COX,
St. Louis, Missouri.